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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 385

ELMER G. PAXTON,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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The opinion of the Supreme Court of Kansas overruling defendant-petitioner's appeal, and affirming the judgment of conviction is reported at 201 Kan. 353, 440 P.2d 650, Supplemental Opinion, 201 Kan. 607, ... P.2d .....(1968), and appears in the record commencing at pages 143 and 154.

STATUTES INVOLVED

K.S.A. 43-116. Exemption from jury service. The following persons shall be exempt from serving as jurors, to wit: All persons holding office under the laws of the United States or this state, attorneys and counselors at law, women, physicians, all registered pharmacists and

assistant pharmacists, ministers of the gospel, professors and teachers of colleges and other institutions of learning, ferrymen, all members of any company of firemen organized according to law, officers and attendants of the state industrial reformatory, and all persons more than sixty-five years of age: *Provided, however,* That this act shall not exempt from jury service township officers and officers of district schools.

K.S.A. 62-1318. Removal to another county in same district when inhabitants prejudiced against defendant. Any criminal cause pending in any district court may be removed by the order of such court, or the judge thereof, to the district court of another county in the same district, whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had therein.

K.S.A. 62-1321. Same; contents of petition; affidavits; notice; rebuttal. In the petition for a change of venue the applicant shall set forth the facts upon which the application is made, and the truth of the allegations in the petition shall be made to appear, by affidavits, to the satisfaction of the court. Notice of such application must be given to the county attorney, who may resist such application by counter affidavits.

STATEMENT OF FACTS

Prior to the late fall of 1962, Mr. R. V. Woodard, of Anthony, Kansas, operated a termite exterminating business. (R. 72, 119-120) Mr. Woodard was acquainted with petitioner Paxton prior to the fall of 1962. (R. 120) Sometime shortly before December, 1962, petitioner and a man named Richard Ulmer traveled to Woodard's home in

Anthony, Kansas, to make some kind of arrangement whereby Paxton, and Woodard could revisit some of Woodard's old customers to renew or "rehash" the old contracts. (R. 30, 37) (Rehashing means to go back to old customers and try and get some kind of additional or different job. Woodard testified that the rehash jobs are sought from elderly persons. (R. 39)

For his participation in the deal, Ulmer was to receive 20% of the proceeds. (R. 30, 37) Paxton and Woodard were to split the remainder. (R. 37, 42) Although Ulmer worked for Paxton, and Paxton was the head of the operation (R. 30, 32, 33, 35, 42), Ulmer received a relatively large proportionate share of the proceeds because he was the check man, or the man who was to cash the checks received from the customers, and it was felt he would be the one exposed to danger of prosecution. (R. 41) If he got into trouble the others were to assist him in securing legal services, etc. (R. 32, 34)

During early December, 1962, Paxton, Woodard, Ulmer and several others traveled through the State of Kansas visiting old customers. (R. 31-32, 37-38) Upon their arrival in Dighton, Kansas, about December 12, they proceeded to the home of Mr. C. W. Monroe, one of Woodard's old termite customers. (R. 26, 38) Woodard, himself did not know that Monroe was a former customer. (R. 47) Paxton knew Monroe was a former *Woodard* customer and that Monroe was elderly. (R. 47)

On December 12, Woodard, Paxton, Ulmer and a fourth man named Barker drove to Monroe's home. (R. 40) Paxton jumped on the floor in the home and indicated that the floor was weak or needed bracing. (R. 27, 40) Later, the men asked if they could inspect underneath the home, and upon receiving permission, Barker

went under the house and came back with a piece of wood which he indicated had wood rot on it. (R. 27) Monroe was told that his house could be permanently protected from wood rot and termites by the application of certain chemicals and/or processes. (R. 27) He was told a contract covering the perpetual maintenance would be furnished, but he never received any contract. (R. 117)

Shortly thereafter, a material was sprayed underneath the home. (R. 115) Paxton and Ulmer then returned to collect for the job. (R. 118) Paxton carried on the conversation on this occasion, and *gave instructions* as to the manner in which Monroe would pay for the job. (R. 116, 118) Monroe was told to make his check for $1156.00 payable to Ulmer (R. 116), who had been identified to Mr. Monroe as the chemical man (R. 116) although Ulmer had no experience with chemicals. (R. 119) Monroe was then told to call his bank and tell them that Ulmer would come in with the check and to instruct the bank to cash the check immediately. (R. 118) All of this he did. (R. 116-117) Ulmer cashed the check and received 20% of the proceeds. (R. 116) The remainder went to Paxton, his employer. Paxton paid the other employees and split the remainder with Woodard. (R. 42)

Edmond Martinez, the District Entomologist for the Kansas State Board of Agriculture inspected Monroe's home in July, 1964. (R. 52, 120, 122-125) Monroe told Martinez about the 1962 application and identified Paxton from pictures as the man who had jumped up and down on the floor. (R. 123)

Martinez inspected the house and found *no evidence of wood rot.* (R. 53, 54, 127) He found termite evidence

only in a piece of loose wood, or trash, on the cellar floor. (R. 53) He found no structural damage. (R. 61, 124) Martinez testified that if there had been prior damage through wood rot or termites it would have been evident since the destroyed wood would have been in the same condition it was when the affliction was arrested. (R. 124) He also testified that if pentachlorophenal (penta) had been used in the treatment of this home, there would have been a crystalline material on the wood surface and there would have been a distinctive odor remaining in 1964. (R. 124-125) He found no evidence of presence of penta. (R. 124) (Paxton and his associates had represented that they would use penta in the treatment of the home on December 12, 1962. Monroe thought he was paying for an application of that chemical. (R. 28-29)) Martinez returned to Monroe's home in October, 1964, with Dean Garwood, his superior in the Entomology Division of the Kansas State Department of Agriculture. At that later time, the two men were accompanied by a carpenter from Dighton, who took random shavings from the wood supports and flooring in the basement. (R. 55)

The wood shavings were taken by Garwood to Loren Delp, a chemist for the State Board of Agriculture. (R. 66) Garwood also testified that he found no indication of wood rot or insect damage in Monroe's basement (R. 65), and agreed if there had been damage, it would have remained and been visible after the basement had been sprayed. (R. 65) He found no evidence that penta had been used in 1962 (R. 65), although evidence of an actual treatment should have existed in 1964. (R. 65)

Loren Delp, head of the pesticide analytical section of the Board of Agriculture Laboratory, received the wood shavings from Garwood, and conducted a spectrophotome-

try test to determine whether penta was present. (R. 70-76) This recognized scientific process (R. 70) revealed, in Delp's opinion, that penta was not present in the wood shavings received from the Monroe home. (R. 74)

Phillip Marvin, Petitioner's entomologist, found some evidence of termite and wood rot in *debris found on the floor* of Monroe's basement in 1967. (R. 82, 130-131) He also testified he found three minute spots on the wood members of the structure in the basement where penta *could have* been present (R. 83), but conducted no tests. (R. 131)

David Hart, a chemist at Oklahoma City University, testified that the tests run by Loren Delp were not necessarily conclusive, and that additional tests could have been run to further determine if penta had been present in the wood shavings taken from the Monroe home. (R. 90, 91)

The trial court overruled a challenge to the array. "The basis of the challenge was that there were no women jurors selected., I have studied the matter carefully and I have gone over the prior jury lists in this county and I find that in prior years and on prior juries we have had women jurors and I have come to the conclusion that there has been no systematic intentional elimination of women jurors; . . . ." (R. 7)

ARGUMENT

I.

Appellant Received a Fair Trial.

A. Prejudicial Publicity, Knowledge of the Case, and Pervasive Community Sentiment.

By doing an excellent job of editorializing counsel for petitioner has constructed "pervasive community sentiment" running against the petitioner. The claim is made that petitioner could not receive a fair trial in Lane County, Kansas. The record simply does not support any such conclusion and as a matter of fact negates the claim.

Kansas provides a pre-trial method for securing a change of venue in the event a criminal defendant would not be likely to receive a fair trial in the county where the information is filed. K.S.A. 62-1318-1321. A request for change of venue must show prejudice by allegations of fact, as opposed to conclusions of counsel, supported by affidavits. K.S.A. 62-1321. If the type of "pervasive community sentiment" running against petitioner actually existed it would seem elementary that petitioner's counsel would have been able to present *affidavits* establishing as a matter of *fact* that such was true. However, no attempt was even made to introduce such facts. Petitioner's trial counsel, Mr. Leland Braun, did offer his personal affidavit that he had talked with one of the jurors on a previous case and that juror had indicated that there might be community sentiment against petitioner. (R. 3-5) It was the only evidence offered to support the allegation of community wide prejudice. The trial court rejected the affidavit as being hearsay. (R.

112) There is no indication in the record that any attempt was made to secure affidavits *from anyone in the community* to support the claim that community wide prejudice existed. Even during the trial, no further attempt was made by counsel for petitioner to demonstrate community wide prejudice.

The record is startlingly devoid of any proof of *any* prejudicial pre-trial publicity. *Compare, Sheppard* v. *Maxwell*, 384 U.S. 333, 337-342 (1966). There was no evidence of prejudicial publicity during the trial. *Compare, Sheppard, supra*, at 342-349. There was no evidence of radio or television coverage, either live, by video tape, or editorially, concerning petitioner's case. *Compare, Estes* v. *Texas*, 381 U.S. 532, 536-538 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723, 724 (1963). There was no evidence of an *excited populace*, or a *mob oriented community*, or of a community wide pattern of deep and wide prejudice. *Compare, Irvin* v. *Dowd*, 366 U.S. 717, 725-728, 729 (1961). There was no evidence that during the trial any improper outside influences of any kind were presented to the jury. *Compare, Turner* v. *Louisiana*, 379 U.S. 466, 467-469 (1965).

The essence of petitioner's argument is that the interrogation of prospective jurors established proof of pervasive community sentiment. Of course, any of the evidence revealed during interrogation of the jurors occurred after the motion for a change of venue had been presented, without support, and overruled. But, even had the voir dire testimony been included in affidavits supporting a motion for change of venue, it would not have revealed that petitioner could not receive a fair trial in Lane County. Forty-three jurors were called for the voir dire examination. The twenty-four jurors constitut-

ing the final panel were passed for cause.[1] (R. 10, 13, 14, 16, 18, 19, 23, 25, 26)

Two of those twenty-four jurors indicated that they had heard rumors, but apparently counsel for petitioner was so unconcerned about the prospective effect of this knowledge that he did not challenge them for cause. (R. 17, 19, 23) These same jurors testified under oath that they could follow the instructions of the Court and would be guided by the evidence. (R. 17, 23) Further, these two jurors did not serve on the jury. (R. 102)

The trial court was abundantly cautious and indeed prompt in excusing jurors who gave any indication that they might have formed an opinion in the case. No such jurors served. However, even had jurors served who had formed an opinion, petitioner would not necessarily be deprived of a fair trial.

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd,* 366 U.S. 717, 723. See also, *Beck* v. *Washington,* 369 U.S. 541, 557 (1962).

Of the remaining nineteen jurors excused, eleven were excused for reasons not related to knowledge of this case. (R. 10, 11, 13, 14, 18, 21, 22, 26) One juror indicated he could not be fair to either side for an unspecified reason. (R. 20) One juror said he knew the sheriff personally

1. Two of the jurors, Ehmke and Barnett, had originally been challenged for cause, but apparently later that challenge was withdrawn. The challenge was not based on the fact that these jurors might have had some knowledge about the case. (R. 11, 13, 15-16)

and had discussed the case with the sheriff. (R. 13) Six jurors indicated they had heard something about the case and had formed an opinion. There was no indication either during voir dire or subsequently, of the nature of the knowledge held by these jurors.

Lane County has a small populace. Prospective jurors are likely to include in their numbers, *inter alia*, persons directly related to witnesses or participating parties, or persons who are personally friendly with county or state officials. It is even likely that in any particular criminal case some of the populace has heard rumors or stories concerning the case. However, in this instance the record is absolutely clear that counsel for both parties and the court strove to insure that the jury panel of twenty-four finally selected had *heard nothing* causing them to form an opinion on the case, thus exhibiting even more caution than strictly required. *Beck, supra*, at 557-558.

Ultimately, petitioner requests this Court to conclude that it is impossible *per se* for a criminal defendant to receive a fair trial in any lightly populated county. It is conceded that in a small county, as well as any other, a prospective defendant *may* not be able to receive a fair trial because of publicity or community wide bias and prejudice under certain demonstrated circumstances. However, unless the facts reveal *exceptional circumstances* present in such cases as *Sheppard* v. *Maxwell, supra*, or *Estes* v. *Texas, supra*, a showing of identifiable prejudice to the accused is required.

> "It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrative reality." *Beck* v. *Washington, supra*, at 558.

It is obvious when comparing *Sheppard* and *Estes* to this case that such exceptional circumstances are not present here. The atmosphere in which the appellant's trial took place was one of total calm. There was no demonstration of any sort of pre-trial or trial publicity in newspaper, radio or television. It strains the imagination to think that this trial on an unspectacular charge of obtaining money under false pretenses is a *cause celebre*.

There is absolute failure in this case to demonstrate and identify any prejudice depriving petitioner of a fair trial.

B. Comments of the Trial Judge.

Petitioner points to three instances during the trial where comments made by the trial judge allegedly deprived him of a fair trial. During the examination of juror West, it was revealed that he was a juror on a "Monroe" trial about four years ago. The trial judge commented that the same evidence basically would be used in this case. After defense counsel objected to the remark but did not move for mistrial, the Court indicated that if he had said that the same evidence would be used he was *mistaken* "but similar circumstances and facts would be involved [with] the same complaining witness, ..." (R. 11) This comment did not indicate the cases were the same, even if it could be assumed the jurors knew anything at all about the *Barker* case which had been tried three years earlier. The significance of *State* v. *Barker* was supplied by petitioner's trial counsel. (R. 25, 28)

Petitioner complains of a remark made by the trial judge during the examination of juror Barnett concerning the effect of the presumption of innocence. Taken in the context in which it was made, it is not even clear

that trial court statement was incorrect. (R. 15-16) In any event, there is no question that the jury was properly instructed on the issue of burden of proof and presumption of innocence. See *State* v. *Paxton*, 201 Kan. 353, 361 (1968).

Petitioner complains of a comment made by the trial judge at the conclusion of the testimony of one of petitioner's expert witnesses. The expert witness, a chemist, testified concerning procedures of analyzing chemical properties of substances. The abstract reveals his testimony was in some part framed in scientific language. The occasion for his cross-examination came late in the day and counsel for the state had requested that the cross-examination be delayed until the next morning. The judge noted that there wasn't much chance the court reporter could read the "scientific terms," or that the judge or county attorney could understand "them." Following this colloquy counsel for the state noted that even though he would have difficulty trying to cross-examine the witness he would try, not because "what [he] said wasn't clear, but because I'm not an analytical chemist." (R. 92) The comments did not concern the witnesses' credibility or reliability.

C. Miscellaneous claims concerning witnesses and jurors

Petitioner claims prejudice because the fact that two of the state's witnesses, who were petitioner's associates, had served sentences in the penitentiary was revealed during the trial. It was clearly noted that the sentences were unreleated to this case. (R. 29, 46) No objection was made to the questioning of witness Ulmer (R. 29), or the voluntary statement of witness Woodard. (R. 45) Had the state not questioned Ulmer in this regard, petitioner's very able trial counsel might well have impeached Ulmer's credibility by the same line of questioning.

Petitioner impugns the manner in which juror Ehmke was questioned by the trial judge. The trial judge asked the juror if the latter *could* and *would* follow the instruction relating to testimonial privilege of a defendant. (R. 12) The question was proper to establish the fitness of a juror to serve. *Irvin* v. *Dowd, supra,* at 723. It would be impossible to determine if jurors would abide courts' instructions if the judge were unable to ask such questions.

Juror Ehmke later, in response to questions from petitioner's counsel, testified that he realized the great responsibility of jury service. (R. 12) He was passed for cause by petitioner's counsel. (R. 13)

Petitioner condemns the action of the Kansas Supreme Court in considering an affidavit of juror Ehmke which it is asserted was not part of the trial record. The Kansas Supreme Court didn't base any portion of its decision on this affidavit. *State* v. *Paxton,* 201 Kan. 607, 607, ... P.2d ..... (1968). (R. 155)

Petitioner had alleged that Ehmke's aunt was the victim of a similar transaction prior to this trial.

There was (1) no evidence that juror Ehmke knew about this transaction (R. 109) (the basis of the rejection of this claim by the Kansas Supreme Court), and (2) no evidence that petitioner was in any way involved in the prior transaction. Juror Ehmke had apparently testified on voir dire that to his knowledge none of his relatives had used the services of a pest control operator. (R. 104)

There is no indication in the record that petitioner ever attempted unsuccessfully to show knowledge of such a transaction on the part of juror Ehmke.

Considering petitioner's indictments of his trial individually or collectively, he was not denied a fair trial.

The individual claims are fallacious, and the "totality of circumstances" does not present any substance of denial of a fair trial.

II

The Manner in Which the Jury Panel Was Drawn Did Not Violate Due Process.

Petitioner objects to the fact that no women were included in the jury panel. Petitioner has no standing to raise this objection.

> "This Court, however, has never entertained a defendant's objection to exclusions to the jury except when he was a member of the excluded class." *Fay* v. *New York*, 332 U.S. 261, 287 (1947).

This pronouncement has not been overruled.

The Kansas statute does not absolutely prohibit the inclusion of women on juries. See K.S.A. 43-116. Consequently, the authority relied upon by petitioner in support of his claim is inapplicable. See *Bass* v. *Mississippi*, 381 F.2d 692, 696 (5th Cir. 1967); *White* v. *Crook*, 251 F. Supp. 401, 403, 408 (D.C. M.D. Ala. 1966). The jury discrimination doctrine based on equal protection of the laws (*Strauder* v. *West Virginia*, 100 U.S. 303, 310 (1880)) therefore does not apply.

Neither is the claim of systematic exclusion of a particular class from the jury (See *Hoyt* v. *Florida*, 368 U.S. 57, 69 (1961)) applicable. The trial court found that there was no systematic exclusion of women from Lane County juries. (R. 7) The record demonstrates no purposeful discrimination, no long course of discriminatory practice, or no deliberate design evidencing discriminatory motives to exclude women from Lane County juries. See *Hoyt*, *supra*, at 68-69.

III

There Was Sufficient Evidence upon Which the Jury Could Base Its Verdict.

Petitioner claims denial of due process because there was no evidence upon which the jury's verdict might be based.

Both the trial court and the *appellate court on review determined that there was sufficient evidence for a reasonable inference of guilt.* *State* v. *Paxton, supra,* at 361-365. Petitioner claims there was no proof of actual knowledge on his part of the representation made to Monroe and fraud involved. As a matter of *state law,* the Kansas Supreme Court found the knowledge required for conviction for obtaining money under false pretenses is not confined to "actual knowledge in the true sense." *State* v. *Paxton, supra,* at 363. In Kansas, knowledge is present, if the

> "representation [that is made] is really untrue . . . [and] is made by one who knows it is untrue, or believes it is untrue, or is quite aware that he has not the slightest notion whether it is true or not." *State* v. *Paxton, supra,* at 364.

There was ample evidence from which it would be inferred, if not directly concluded, that petitioner's intention was to convey the impression that the facts related to Mr. Monroe concerning the existence of wood rot and the necessity of spraying were actually true and should be acted upon by Mr. Monroe. (R. 26, 27, 30, 33, 114-115, 117) There was sufficient direct evidence as well as circumstantial evidence by the testimony of two state's witnesses that they could find no presence of wood rot or termites in the floor structure, substructure, or supports underneath Monroe's house. (R. 53, 54, 65, 127)

There was evidence that if wood rot or termite infestation had been present in 1962, evidence of it would have remained on the occasion of the visual inspection in 1964. (R. 65, 124) There was also substantial evidence that had Monroe's cellar been treated with penta, as represented by petitioner and his associates, evidence of it would have remained, and would have been discoverable by visual observation, smell, and chemical analysis. (R. 65, 124-125) The state's evidence was that there was no evidence of the existence of penta. (R. 65, 74, 124) Assuming that petitioner's evidence was in conflict with the evidence submitted by the state, a jury question remained.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied

Respectfully submitted,

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